

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting application for correction of homestead patent OR-38030.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents -- Patents of Public Lands: Corrections

BLM may properly reject an application to correct a homestead patent to include certain land where, although the original patentee may have intended to enter that land, the applicant acquired the patented homestead with a specific disclaimer of any transfer of the land and, thus, has no equitable interest in the land.

APPEARANCES: Arthur Warren Jones, pro se, and for the other appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Arthur Warren Jones, James Noxon, and Alice J. Noxon have appealed from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated October 2, 1985, rejecting their application for the correction of a homestead patent, OR-38030, filed pursuant to section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (1982).

The record indicates that in December 1882 William Charley filed a homestead application (No. 4000) for the N 1/2 NW 1/4 and the N 1/2 NE 1/4 (lots 1 through 4) sec. 5, T. 38 S., R. 2 E., Willamette Meridian, Jackson County, Oregon, pursuant to Rev. Stat. § 2289, codified at 43 U.S.C. § 161 (1982). In a November 13, 1882, affidavit, Charley stated that his "settlement" had begun on September 30, 1882, and that his improvements then consisted of "a log dwelling house and about 1000 rails ready to put into [a] fence." The record further indicates that Charley amended his homestead application in November 1886 to embrace other land, specifically, the N 1/2 SW 1/4 and the N 1/2 SE 1/4 sec. 5, T. 38 S., R. 2 E., Willamette Meridian, Jackson County, Oregon. In a March 7, 1891, affidavit, Charley explained that his original application had been prepared by William Hoffman, who had mistakenly applied

for lots 1 through 4 "instead of the land I intended to then and there Homestead and which I was then living on, to wit; the N² of S.E.⁴ [and] N² of S.W.4 Sec. 5 Tp. 38 S. R. 2 E. W.M."

By affidavit dated March 7, 1891, Charley applied to perfect his homestead claim. In related documents, Charley and two witnesses attest to the cultivation of 15 acres and various improvements, described as a box house (31 by 25 feet), a wood house, a wagon shed, a springhouse, two log barns, fencing, and an orchard. On January 13, 1894, the United States patented 160 acres of land described as the N 1/2 SW 1/4 and the N 1/2 SE 1/4 sec. 5 to Charley.

Appellants' interest in the N 1/2 S 1/2 sec. 5 arises from a July 23, 1976, warranty deed from E. C. McCammon, Delbert M. Brenner, and Margaret Lee Brenner to James Noxon and a September 17, 1982, warranty deed under which James Noxon conveyed, respectively, undivided 35- and 5-percent interests to Alice J. Noxon and Arthur Warren Jones.

On December 12, 1984, appellants filed an application to correct the 1894 patent of the N 1/2 S 1/2 sec. 5 to Charley, contending that the "original homestead was meant to include the entire lower meadow included in S 1/2 SW 1/4 NW 1/4 of Sec. 5," which land contained "many of the [patentee's] structures" and had "always been regarded as part of the property of which we bought in 1976." Appellants sought to amend the patent to include the S 1/2 SW 1/4 NW 1/4 sec. 5 in place of the S 1/2 NE 1/4 SE 1/4 sec. 5.

In its October 1985 decision, BLM rejected appellants' application because appellants had failed to establish either that the 1894 patent contained an erroneous land description or that appellants were deserving of a corrected patent as a matter of equity and justice. On the first point, BLM concluded that Charley's amendment of his homestead application indicated he "knew precisely what land he was occupying and the physical location of the land as it related to the existing survey lines and corners." On the second point, BLM concluded that equity and justice did not weigh in appellants' favor where they had neither an "equitable stake" in the efforts of the original patentee nor any "relationship or privity" with him and where the "Land Sale Contract" under which James Noxon had acquired his interest in the land specifically stated that the "residence" used in connection with the land was located "on BLM property." Appellants have appealed from the October 1985 BLM decision.

[1] Section 316 of FLPMA authorizes the Secretary of the Interior to "correct patents * * * where necessary in order to eliminate errors." 43 U.S.C. § 1746 (1982). The statute, thus, invests the Secretary with discretionary authority to correct patents which contain an erroneous description of the patented land such that the description does not match the land the patentee either originally applied for or entered or intended to enter on the ground. Rosander Mining Co., 84 IBLA 60 (1984); Elmer L. Lowe, 80 IBLA 101 (1984); George Val Snow (On Judicial Remand), 79 IBLA 261 (1984). By regulation the term "error" is limited to mistakes of fact and not mistakes of law. 43 CFR 1865.0-5(b); Bill G. Minton, 91 IBLA 108 (1986).

In the present case, the 1894 patent to William Charley describes the same land contained in the patentee's amended homestead application. Appellants do not argue that there has been any error in transcription.

Rather, they contend that the 1894 patent is erroneous because it does not encompass certain land which the patentee actually settled upon and, therefore, presumably intended to enter, specifically, the S 1/2 SW 1/4 NW 1/4 sec. 5. As proof of this, appellants point to the fact that this land contains certain "old homestead sites." Appellants have submitted a copy of an aerial photograph of the patented and surrounding land on which they purport to identify various "sites" within the S 1/2 SW 1/4 NW 1/4 sec. 5, specifically, the sites of the original "homestead," wagon shed or guest house, springhouse, one log barn, and orchard. The location of some of these sites, including the "old homestead" identified on appellants' aerial photograph, is somewhat confirmed by a hand-drawn map prepared at BLM's direction by Margaret Lee Brenner. See Land Report, dated July 9, 1985, Attachment A. However, appellants have submitted no ground level photographs of the sites or other proof that these sites contain the remnants of the original homestead structures.

In a July 9, 1985, land report, a BLM realty specialist assessed appellants' application to correct the 1894 patent, concluding that Charley had "occupied public land outside of his patented homestead" ^{1/} but that, even if there had been an error in the patent description, appellants were not entitled to that occupied land because the disclaimer clause in the "Land Sale Contract" cancelled their "claim of equity * * * in the original efforts of the homestead entryman" (Land Report at 10, 12). The BLM realty specialist, therefore, recommended rejection of appellants' application.

As its October 1985 decision demonstrates, BLM is now of the opinion that the original patentee had not actually settled on any public land outside his patented homestead. BLM bases this conclusion on the fact that Charley amended his homestead application to include occupied land identified by "existing survey lines and corners." The record, indeed, establishes that the exterior lines of sec. 5 were surveyed in 1881, shortly before the initiation of the homestead entry, and that the west quarter corner of that section, which was the corner nearest to the land now sought by appellants, was set on May 3, 1881.

We agree with BLM that the amendment of the homestead application to include land specifically described by legal subdivision is some evidence that the original patentee did not intend to enter land not described in the application. However, we must admit that this fact does not completely rule out the possibility the original patentee intended to enter the disputed land. In particular, BLM's argument assumes Charley amended his homestead application with specific reference to the west quarter corner of sec. 5, as well as the east-west subdivisional line in sec. 5 which had not been surveyed

^{1/} In a July 30, 1984, memorandum, the BLM realty specialist relied on the fact that the "orchard presently situated on public land could possibly be [the] same orchard [described in the record with respect to the 1894 patent]."

at the time of the homestead entry. ^{2/} See Memorandum, dated August 7, 1985, from Chief, Branch of Cadastral Survey to Chief, Branch of Lands and Minerals Operations. Moreover, assuming that the sites of some of the structures used by the patentee in conjunction with his homestead entry, including the "old homestead," are situated north of the patented land, as appellants maintain, this is persuasive evidence that the patentee actually settled upon and intended to enter the disputed land. However, the evidence as it stands now does not conclusively establish that the patentee did not accurately describe the land he intended to enter and that, therefore, the patent contains an erroneous description. Cf. Mantle Ranch Corp., 47 IBLA 17, 87 I.D. 143 (1980).

Generally, however, given the evidence regarding settlement by the original patentee of land other than that described in his patent, we would refer this case to an Administrative Law Judge for a hearing and a decision on this question. However, allowance of an application for correction of a patent is dependent, under section 316 of FLPMA, not only on a showing of factual error but also a demonstration that considerations of equity and justice favor such an allowance. George Val Snow (On Judicial Remand), *supra*. It is well established that the original patentee and generally his or her heirs have such an "equitable interest" in the land actually settled upon as will justify correction of the original patent in their favor, in order to include that land. *Id.* at 262. However, the question becomes more difficult when considering whether to correct a patent in favor of a remote transferee. Nevertheless, in George Val Snow (On Judicial Remand), *supra* at 263 (quoting from George Val Snow, 46 IBLA 101, 104 (1980)), we concluded that a remote transferee might be deserving of relief where he or she, "in good faith and in the exercise of reasonable diligence, had invested substantially in improving the property, or had paid a purchase price based on the value of the improvements in place." The crucial question is whether the transferee had a good faith belief that he or she was acquiring the land as part of the patented homestead, which belief stemmed from the original error in the homestead patent. That good faith belief might be demonstrated by the transferee's purchase or investment in the land. Thus, in George Val Snow (On Judicial Remand), *supra* at 265, we concluded that a remote transferee was entitled to correction of a homestead patent to include land other than that which he had actually acquired (which land the original patentee had actually entered, settled and earned) where, although the transferee had been negligent in not confirming that this land was not included in the transfer, he had reason to believe that it was included because of "his long familiarity with the land, its local reputation at the Madsen homestead, and the physical definition of the parcel on the ground provided by the fence lines."

In concluding that appellants are not deserving of relief by virtue of considerations of equity and justice, BLM relied primarily on the "Land Sale Contract." That contract, dated July 23, 1976, provided for the sale of

^{2/} We also note that the amendment of the original homestead application represented a gross shift in the description of the entry from the north half of the north half to the north half of the south half of sec. 5. This does not establish that the entryman was also necessarily aware that a small portion of his entry may have fallen slightly north of the then nonexistent east-west subdivisional line of sec. 5.

approximately 400 acres of land, including the N 1/2 S 1/2 of sec. 5, from E. C. McCammon, Delbert M. Brenner, and Margaret Lee Brenner to James

Noxon for a purchase price of \$ 145,000. The contract contained the following disclaimer: "Purchaser acknowledges that there is no residence on the described property, the home commonly used in connection with the same being on BLM property, and further that the within contract does not purport to transfer any interest in any residence building." Appellant contend that, despite the disclaimer, they have an "equitable interest" in the land in the S 1/2 SW 1/4 NW 1/4 sec. 5, which encompasses a house and which, together with the house, was purportedly transferred "outside of the land sale contract." ^{3/} Appellants point to no other document which they claim purports to transfer that land. Rather, the only evidence of a transfer is an April 24, 1985, affidavit in which Margaret Lee Brenner states that McCammon and the Brenners "gave" the house, and presumably also the surrounding land, to James Noxon at the time of the 1976 land sale. ^{4/} Even assuming that there was what appellants believe to be an oral transfer of the disputed land along with the house, there is no evidence that Noxon paid any purchase price for that purported transfer or that he or the other appellants substantially improved the land following the transfer. Indeed, the record indicates that the house on the disputed land was built by a predecessor in interest. In these circumstances, we cannot conclude that appellants have an "equitable stake" in the efforts of the original homestead entryman. Moreover, the disclaimer in the land sale contract stated that the land was "BLM property." In a July 6, 1985, letter to BLM, Jones sought to characterize the situation at the time of the 1976 sale as a "dispute with the B.L.M. over * * * property lines." In any case, in view of the disclaimer, Noxon cannot be said to have had at the time of purchase a good faith belief that he was acquiring the house and the surrounding land as part of the patented homestead.

^{3/} In a July 6, 1985, letter to BLM, Jones explained that the land was bought in 1976 with full knowledge that a "1974" BLM dependent resurvey had placed the house "100 or so feet onto government land."

"Yes when we bought the property in 1976 we knew that there was a dispute with the B.L.M. over the house and property lines. The Sellers were scared to death that they were going to be sued by the government for the last 15 years back rent on their home and land. We agreed to buy the property as is with all problems involved. We also agreed not to purport to transfer any monetary interest in any residence building. This was to assure them that we would not sue them for any back rent if the B.L.M. won the property line dispute."

^{4/} Arguably, the Brenner affidavit is ambiguous on this point. The affidavit states:

"I, Mrs. Delbert Brenner, the same as: or the Brenners that sold Mr. James Noxon the property at 16079 East Antelope Road (The property in question here today). The house located at that address at that time belonged to us and when we sold the property we gave the house to Mr. James Noxon at the time of the closing of the property, August 15, 1976.

"At that time we did not know how to dispose of the house because of the discrepancy [sic] between the lines of the BLM and the property.

"There was never any doubt in the BLM's mind who the house belonged to. It was ours by rights when we purchased the property in 1959 so we gave it to the new owners of the land, Mr. James Noxon."

As construed by the Board, section 316 of FLPMA is designed to correct factual errors in patents where to do so would benefit innocent transferees who would otherwise be denied the benefit of their purchase or investment. It was not designed to benefit those transferees who acquire land with the aim of acquiring land other than that which they bargained for. We do not impugn appellants' motives in seeking to correct the original homestead patent. But neither equity nor justice weigh in favor of those who, at the time of purported acquisition, had no reason to believe they were acquiring any land other than that which they had originally bargained for. That is the situation here. We, therefore, conclude that appellants have not demonstrated such equitable considerations as would justify correction of the 1894 patent in their favor, even assuming it failed to describe land which the patentee had originally intended to enter. BLM, therefore, properly rejected appellants' application to correct the patent.

However, before concluding this case, we must deal with another claim raised by appellants which is directly contrary to their contention, discussed supra, that the 1894 patent failed to describe land which the patentee had intended to enter and, thus, should be corrected. This contention is that, while the 1894 patent correctly described the land which the patentee had intended to enter, as originally surveyed, a 1974 BLM dependent resurvey had then erroneously excluded a portion of that land by a shift in the east-west subdivisional line of sec. 5 caused by movement of the west quarter corner. This shift is depicted on appellants' copy of the aerial photograph, referred to supra. In effect, appellants are arguing that the disputed land is actually part of the originally surveyed N 1/2 S 1/2 of sec. 5, which is the patented homestead. The sum of appellants' argument in this regard is that the 1974 BLM dependent resurvey must necessarily be in error because it does not conform to the original property boundary which placed the disputed land under private ownership. The question of the accuracy of the BLM dependent resurvey is not properly before the Board where it was not the subject of a prior adjudication by BLM. Domenico Tussio, 24 IBLA 141, 143 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

John H. Kelly
Administrative Judge.